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**IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA
FIFTH APPELLATE DISTRICT**

THE PEOPLE,

Plaintiff and Respondent,

v.

MICHAEL CARTER,

Defendant and Appellant.

F038154

(Super. Ct. No. SC081988A)

OPINION

THE COURT*

APPEAL from a judgment of the Superior Court of Kern County. Arthur E. Wallace, Judge.

Michael Bacall, under appointment by the Court of Appeal, for Defendant and Appellant.

Bill Lockyer, Attorney General, Robert R. Anderson, Chief Assistant Attorney General, Jo Graves, Assistant Attorney General, and Carlos A. Martinez, Deputy Attorney General, for Plaintiff and Respondent.

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* Before Vartabedian, Acting P. J., Harris, J. and Cornell, J.

STATEMENT OF THE CASE

On December 13, 2000, the Kern County District Attorney filed a complaint in the Mojave Judicial District of Kern County Municipal Court charging appellant as follows: count I—possession of a weapon while confined in a penal institution (Pen. Code,¹ § 4502, subd. (a)) with six prior felony convictions (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and one prior prison term (§ 667.5, subd. (b)).

On January 29, 2001, the court conducted a preliminary hearing, and held appellant to answer.

On the same date, appellant, in pro. per., filed a motion for postponement of time for one year to conduct legal research and prepare an adequate defense.

On February 5, 2001, the Kern County District Attorney filed an information in superior court charging appellant as follows: count I—possession of a weapon while confined in a penal institution (Pen. Code, § 4502, subd. (a)) with six prior felony convictions (§§ 667, subds. (c)-(j), 1170.12, subds. (a)-(e)) and one prior prison term (§ 667.5, subd. (b)).

On February 9, 2001, appellant was arraigned, pleaded not guilty to the substantive count, denied the special allegations, and requested a jury trial.

On March 9, 2001, appellant filed a motion to discharge his public defender and substitute another attorney under *People v. Marsden* (1970) 2 Cal.3d 118.

On March 13, 2001, the court conducted an in camera *Marsden* hearing and denied appellant's motion.

On March 28, 2001, appellant withdrew his not guilty plea, entered a plea of nolo contendere to count I, and admitted the six prior felony conviction allegations. In exchange, the People agreed to dismissal of the prior prison term allegation. Appellant

¹ All further statutory references are to the Penal Code unless otherwise indicated.

entered the plea with the understanding the court, at sentencing, would entertain a motion to strike five of appellant's six prior strike convictions under *People v. Superior Court (Romero)* (1996) 13 Cal.4th 497.

On April 19, 2001, appellant filed a request that the court exercise its power to dismiss his prior convictions in furtherance of justice. (§ 1385.)

On April 25, 2001, the court conducted a sentencing hearing and granted appellant's motion to strike the prior felony convictions for sentencing purposes. The court concluded the strike priors occurred 11 years earlier and constituted a single period of aberrant behavior. The court then denied appellant probation, imposed the upper term of eight years on the substantive count, and directed the term be served consecutive to that imposed in Los Angeles County Superior Court case No. PC004292. The court imposed a \$200 restitution fine (§ 1202.4, subd. (b)) and imposed and suspended a second such fine pending successful completion of parole (§ 1202.45).

On May 10, 2001, appellant filed a timely notice of appeal challenging the validity of the plea and a request for certificate of probable cause (§ 1237.5; Cal. Rules of Court, rule 31(d)). On May 7, 2001, the superior court granted appellant's request for certificate of probable cause.

STATEMENT OF FACTS

The following facts are taken from the probation officer's report filed April 25, 2001:

"On October 26, 2000, an officer conducting clothed body searches of inmates going to the kitchen felt an object in the coat worn by inmate Michael Carter, the defendant. The defendant was instructed to retrieve the object and give it to the officer, but was reluctant to comply and acted suspiciously. Eventually, he removed his coat, but before giving it to the officer, fled. After a short pursuit, the defendant turned and faced the officer in a threatening manner. He then threw an object over the canteen wall into 'No Man's Land.' The officer then pepper sprayed the defendant who fell on the ground without further resistance.

“The object thrown by the defendant was retrieved and discovered to be an inmate manufactured weapon comprised of a razor blade melted into a toothbrush handle measuring approximately three and three-quarters inch long by one and one-eighth inches wide.”

Defense

The following statement is taken from the probation officer’s report filed April 25, 2001:

“At the Presentence Investigation interview conducted by the [probation officer] on April 10, 2001, at the prison in [Tehachapi], he denied possessing a weapon and stated he took the deal to avoid a 25 years to Life sentence. The defendant declined to discuss this case further.”

DISCUSSION

Appellant’s appointed counsel has filed an opening brief which adequately summarizes the facts and adequately cites to the record, which raises no issues, and asks this court independently to review the record. (*People v. Wende* (1979) 25 Cal.3d 436.) By letter of November 30, 2001, this court invited appellant to submit additional briefing and state any grounds of appeal he may wish this court to consider.

A. Contentions from Opening Letter Brief

On December 20, 2001, appellant filed an opening letter brief setting forth additional facts. Appellant stated in relevant part:

“Petitioner’s counsel in the lower courts practically threatened him into accepting a plea barg[ain] which petitioner/appellant was against. Appellant informed counsel that he wished to proceed to trial. But appellants counsel told him that if he did not accept the deal, he would surely receive a life sentence.

“This attitude by appellants counsel, exemplified his unwillingness to represent appellant in a professional manner at trial. Counsel failed to present evidence or challenge the prosecutorial misconduct and unethical practice of obstruction of justice by prosecution who called the prison and advised prison officials to not allow petitioner to question his [accusers] at his institutional hearing to avoid conflicting testimony, since the case against petitioner was a three (3) strikes case and still ongoing in court.

“Even though petitioner presented the documents from prison officials addressing this matter to Arthur Titus, he elected to disregard the matter as having no validity and refused to act on it – by submitting the motion petitioner had given him—or state it for the record in court. [¶] . . . [¶]

“The Code of Professional Responsibility in which all attorney’s are governed requires attorneys to remain abreast and or educated of all accessible law within the legal arena Therefore, counsel had no justifiable excuse for not filing the necessary and requested motions (e.g., motion to dismiss in the interest of justice and prosecutorial misconduct, motion for discovery, motion for change of venue, and motion for expert for venue related research and qualified survey) to the courts on petitioner’s behalf to ensure that petitioner received adequate legal representation, only to have been unprofessional and an exhibition of legal malpractice. This decision inevitably undermined the confidence and validity of petitioner’s readiness for pretrial/trial. . . . [¶] . . . [¶]

“Public Defender, Arthur Titus displayed severe indolence and disregard toward adequately and diligently representing petitioner. Arthur Titus was adamant [*sic*] about petitioner taking the plea bargain rather than preparing and presenting a defense.

“Arthur Titus neither obliged petitioner with submitting motions that would have exonerated petitioner nor filed the motions provided by petitioner to be presented on the courts.

“Arthur Titus, also refused to excuse himself from petitioner’s case at his personal request, which was a significant factor in petitioner’s request to dismiss counsel on a motion filed on February 26, 20001, which the judge denied, along with petitioner’s motion for change of venue, at which time Arthur Titus expressed to the court that change of venue was not needed or necessary.

“Public defender, Arthur Titus is not an expert in the field of venue related research nor is he trained to conduct qualified surveys. Yet, Arthur Titus felt obligated to ‘oppose’ petitioner’s motion for change of venue . . . something a prosecutor or surrogate prosecutor would have done.

“Though the appearance was scheduled for ‘motions’ Arthur Titus had not prepared nor presented one (1) single motion on behalf of petitioner’s defense.

“The acts perpetrated by public defender Arthur Titus are reflective of an attorney who is unqualified or plainly uninterested in being a [diligent] advocate for petitioner’s rights. . . .

“Public defender, Arthur Titus not only exhibited lack of devotion but also disinterest as well as, prejudice and bias against appellant, which explains why counsel made no efforts at all to effectively represent appellant . . .

“It is quite evident and obvious that appellant was denied a fair representation by counsel and therefore appellant[’]s conviction must and shall be reversed.

“Furthermore, there was extreme discrimination exhibited in the reasoning behind appellant’s case being accepted for prosecution.

“In the prison where appellant was housed, and accused of the crime appellant is appealing from, there had been (10) ten individual prisoners who had been caught with prison manufactured weapons on their person—June 1999—June 2001—the only difference between those individuals and appellant is the fact each of the individuals were serving life sentences as to where appellant was due to be released into society within five (5) months.

“This selective prosecution displays discrimination and discriminatory enforcement of the law. Though it was not racial discrimination, it was discrimination [nonetheless]. If lifers are not prosecuted for acts that persons serving determinate sentences are prosecuted for is undoubt[edly] discrimination. . . .” (Underscoring omitted.)

We initially note appellant moved under *Marsden* to relieve his preliminary hearing counsel, Deputy Public Defender Gary Jabury, for conflict of interest and to proceed in propria persona. On January 29, 2001, the court conducted an in camera hearing as to that motion. Appellant expressed disagreement with Jabury regarding the retention of an investigator and about Jabury’s lack of time to discuss the merits of the case with appellant before proceeding to preliminary hearing. Appellant spoke at length about his dissatisfaction with Jabury’s representation and Jabury, in turn, gave a detailed chronology of representation of criminal clients at the preliminary hearing stage as well as his efforts to confer with the appellant in the instant case. The court denied the motion to relieve Jabury without prejudice, characterizing the dispute as “simply a disagreement

over how the matter should be handled and obviously deference needs to go to the attorney who has training and understanding of the law in this area.”

With respect to Deputy Public Defender Titus, appellant moved on March 9, 2001, to discharge the public defender’s office as his counsel. On March 13, 2001, the court conducted an in camera hearing on the motion. Appellant claimed Titus did not sufficiently confer with appellant and did not offer appellant adequate representation. Appellant pointed out he (appellant) had filed motions for change of venue, discovery, funding for expert venue-related research and qualified survey, and for dismissal in the interest of justice. Appellant stated he informed counsel he had filed the motions and asked him to also do so. Appellant stated counsel said he wouldn’t do so because he didn’t think it was necessary. Appellant maintained a change of venue was necessary because there is “basically a bias towards people who are already in prison.” Appellant further maintained:

“[E]verybody within this community is hooked up with law enforcement in some kind of way or has some type of tie with someone in it. Therefore, if I’m being charged with a case and allegation by a correctional officer, because correctional officers are on the side of citizens community sheriff, how can I get a fair trial when everyone is going to accept the word of a police, since this is a police-ran county? There’s no way I can get a fair trial here.”

Appellant lastly argued that he wanted Titus to “act like an attorney.” He maintained counsel should “[k]eep me informed, post me of it, keep me abreast of everything. Going in there and letting me know what type of strategy, whatever, whatever.”

In response, attorney Titus stated he started with the Kern County Public Defender’s office in 1981, had handled all criminal cases since that time, and had done criminal law work in another county prior to 1981. Titus said he met with appellant on February 26, 2001, and indicated he would have an investigator contact appellant. According to Titus, the investigator had “the documents and everything with regard to

Mr. Carter's past record that is alleged as strikes" and was "going to do whatever investigation at the prison is necessary to be done. And that's going to take place tomorrow."

Titus said he had extensive experience in criminal trial practice, including three strikes cases and cases raising issues of prison staff misconduct and falsification of evidence. As a result, Titus maintained he was experienced in the issues related to appellant's case. With respect to appellant's motion to change venue, Titus "didn't feel that a change of venue motion would be granted or meritorious. There's no publicity to this case whatsoever. It will be coming to the jury without any press whatsoever." Titus essentially thought it was inappropriate to seek a change of venue.

As to correctional officers serving on a jury, Titus said he had confronted that problem in the past and would work with appellant to select an appropriate jury that would be fair. With respect to appellant's prior strikes, Titus said he assigned an investigator to specifically obtain the prior strike information from the County of Los Angeles. According to Titus, the chief investigator of the Kern County Public Defender's office was able to obtain appellant's records from the County of Los Angeles archives.

Based on the information presented, the court concluded there was no breakdown of an attorney-client relationship that would impair Titus's appropriate and proper representation of appellant's interests. The court denied appellant's *Marsden* motion and nothing in the instant record suggests that the trial court abused its discretion. This is particularly true where counsel successfully secured an eight-year determinate term for a recidivist client who was facing a sentence of 25 years to life under the stringent provisions of the three strikes law.

B. Contentions from Appellant's Supplemental Opening Brief

On July 9, 2002, appellant filed a supplemental opening brief in this court alleging prosecutorial misconduct and obstruction of justice. Appellant argued in this brief:

“On December 14, 2000, the Kern County District Attorney’s office agreed to prosecute appellant for possession of a weapon. . . . [¶] Sometime between December 14, 2000 and December 24, 2000, this district attorney’s prosecutors contacted prison officials and instructed them to not allow appellant to question reporting employees in efforts to avoid contradictory testimony -- obstructing justice.

“On December 23, 2000, Senior Hearing Officer Lieutenant K. Sampson (Institutional Staff) attempted to hold appellant’s hearing without allowing him to confront his accus[e]rs -- as instructed by the prosecution. The hearing was postponed until the next day of December 24, 2000. During the hearing Lieutenant K. Sampson was adam[a]nt about refusing appellant the right to confront his accus[e]rs. . . .

“Institutional Lieutenant K. Sampson knowingly violated appellant’s due process rights of the 5th Amnd, at the advisement of the Kern County District Attorney’s office. The violation was so blatant that outside upper echelon, CSR, ‘deferred’ all actions taken against appellant for due process violations on January 30, 2001. . . .

“Appellant filed motions addressing these issues with the court and with court appointed counsel to no avail. [¶] At instruction of CSP -- Action appellant was entitled to another hearing. Sometime between January 30, 2001 to March 25, 2001, the prosecution contacted prison officials a second time, instructing them to deprive appellant of his due process rights.

“On March 25, 2001, Institutional Lieutenant W.D. Nelson informed appellant that the prosecution advi[s]ed them to refuse appellant the opportunity to confront his accus[e]rs, but he couldn’t violate appellant’s due process. . . .

“On March 28, 2001, appellant presented this information on written documents to his court appointed counsel, who did nothing to address the issue. Besides showing the prosecution the numerous documents depicting contradictions in testimony and perjured testimony by Daniel Bray, nothing else was done by counsel or the prosecution for that matter. [¶] . . . [¶]

“On October 26, 2000, Daniel Bray and Erica Howard submitted falsified documents -- to be used in court -- against appellant. (Pen. Code, § 132; Pen. Code, § 134.)

“On the date of the preliminary hearing in municipal court, Daniel Bray offered false testimony that had been excluded, but later included into his

fabricated report while under oath, thereby committing perjury. (Pen. Code, § 118.)

“Throughout the course of the proceedings, several investigative reports were filed. During the time information and statements were being retrieved, Daniel Bray had offered three (3) different statements on how the alleged incident was to ha[ve] transpired, as well as his dubious report of having witnessed an object, and how it was retrieved -- if there ever was an object. [¶] . . . [¶]

“The prosecution knowingly used perjured testimony in order to obtain appellant’s conviction. The intimidation factor was prev[a]lent -- the fear of receiving three-strikes unjustly. And the evidence which would have impeached the testimony given against appellant was suppressed. The deprivation of an opportunity to present such evidence as appellant had that can be said the due process of law has been denied.” (Fn. omitted.)

The applicable federal and state standards regarding prosecutorial misconduct are well established. A prosecutor’s intemperate behavior violates the federal Constitution when it comprises a pattern of conduct so egregious that it infects the trial with such unfairness as to make the conviction a denial of due process. (*People v. Gionis* (1995) 9 Cal.4th 1196, 1214; *People v. Espinoza* (1992) 3 Cal.4th 806, 820.) Conduct by a prosecutor that does not render a criminal trial fundamentally unfair is prosecutorial misconduct only if it involves the use of deceptive or reprehensible methods to attempt to persuade either the court or the jury. (*People v. Espinoza, supra*, at p. 820; *People v. Samayoa* (1997) 15 Cal.4th 795, 841; *People v. Hill* (1998) 17 Cal.4th 800, 819.) Generally, a reviewing court will not review a claim of misconduct in the absence of an objection and request for admonishment at trial. (*People v. Gionis, supra*, at p. 1215.) To preserve a claim of misconduct for appeal, the defense must make a timely objection at trial and request an admonition. Otherwise, the point is reviewable only if an admonition would not have cured the harm caused by the misconduct. (*People v. Bradford* (1997) 15 Cal.4th 1229, 1333; *People v. Barnett* (1998) 17 Cal.4th 1044, 1133.)

The instant record does not reflect an objection and request for admonishment. Assuming arguendo preservation of the claim of misconduct, we must examine the

underlying issues of alleged perjury and obstruction of justice. In California, the elements of perjury are a willful statement, made under oath, of any material matter, which the witness knows to be false. (§ 118.) (*People v. Howard* (1993) 17 Cal.App.4th 999, 1004.) False testimony in a judicial or legislative proceeding is material if that testimony could probably have influenced the outcome of the proceedings. (*People v. Jimenez* (1992) 11 Cal.App.4th 1611, 1622, disapproved on another point in *People v. Kobrin* (1995) 11 Cal.4th 416, 419, 425, fn. 5.) Thus, a false statement having such a tendency may be perjury even though it did not, in fact, affect the proceeding in or for which it was made. Moreover, the false testimony need not be directly material; it is sufficient if it is circumstantially material. (*People v. Poe* (1968) 265 Cal.App.2d 385, 390-391.) In addition, opinion testimony constitutes perjury if the witness does not honestly hold the opinion to which he or she testifies. (*People v. Webb* (1999) 74 Cal.App.4th 688, 695.) Further, perjury cannot be willful where the oath is according to the belief and conviction of the witness as to its truth. (*In re Lindley* (1947) 29 Cal.2d 709, 723.)

No person shall be convicted of perjury where proof of falsity rests solely upon contradiction by testimony of a single person other than the defendant. (§ 118, subd. (b).) When a witness's answers are literally true, he may not be faulted for failing to volunteer more explicit information. Although such testimony may cause a misleading impression due to the failure of counsel to ask more specific questions, the witness's failure to volunteer testimony to avoid the misleading impression does not constitute perjury. That is because the crucial element of falsity is not present in his testimony. (*Cabe v. Superior Court* (1998) 63 Cal.App.4th 732, 738.)

In the instant case, appellant claims Correctional Officer Daniel Bray committed perjury and bases his claim on selected portions of the following documents: (1) a California Department of Corrections (CDC) "Rules Violation Report" (RVR) dated December 24, 2000; (2) a CDC "Inmate/Parolee Appeal Form" submitted March 25,

2001; (3) a CDC RVR dated October 26, 2000; (4) five separate pages from the 35-page reporter's transcript of preliminary hearing held January 29, 2001; (5) a CDC RVR dated December 14, 2000; (6) five separate pages from a 10-page CDC RVR dated March 19, 2001; and (7) four separate pages from a six-page CDC RVR dated March 25, 2001.

Appellant's argument is nothing more than an attempt to spin certain inconsistencies and factual gaps in the foregoing documents into a web of perjury. However, a charge of perjury cannot stand where proof of falsity rests solely upon contradiction by testimony of a single person other than the alleged perjurer. (§ 118, subd. (b).) Thus, appellant's version of events, taken alone, is insufficient. To overcome this problem, appellant (a) compares the various reports and documents, (b) identifies certain contradictions and inconsistencies relating to the sequence of events, his attire on the date of the incident, and the packaging of the contraband, and (c) concludes that perjury occurred.

Portions of these reports are attached as exhibits to appellant's supplemental letter brief. Nevertheless, we cannot determine from these excerpts whether Correctional Officer Bray knowingly made false statements, suffered from innocent misrecollection, or was subject to questioning that failed to elicit full and complete answers about the underlying incident. Under California law it is well settled that an appellant must produce a record, which discloses that an error relied upon, has, in fact, occurred. (*People v. Lopez* (1949) 93 Cal.App.2d 664, 668.) Appellant's exhibits do not satisfy this standard and his claim of perjured testimony by Officer Bray must be rejected.

Appellant also contends the office of the district attorney obstructed justice by contacting prison officials and instructing them "to not allow appellant to question reporting employees in efforts to avoid contradictory testimony." Generally speaking, conduct that constitutes an offense against public justice, or the administration of law, includes both malfeasance and nonfeasance by an officer in connection with the administration of his public duties. Such conduct also includes anything done by a

person in hindering or obstructing an officer in the performance of his official obligations. Such an offense was recognized at common law and generally punishable as a misdemeanor. Now, quite generally, it has been made a statutory crime and, under some circumstances, a felony. (*Lorenson v. Superior Court* (1950) 35 Cal.2d 49, 59.)

In the “Inmate/Parolee Appeal Form” dated March 25, 2001, appellant claimed the district attorney advised Correctional Lieutenant Paul Nelson “not to allow staff to respond to any of the questions prepared by [appellant] due to the case being ongoing in court.” In an informal level staff response dated March 31, 2001, Lieutenant Nelson stated: “Recommend that you resubmit this appeal when you receive final copy of CDC 115 [rules violation report]. Witnesses were questioned directly from list of questions that you submitted.” Aside from the unsupported claim in the “Inmate/Parolee Appeal Form,” nothing in the record supports appellant’s contention that the district attorney intervened with officials at the California Correctional Institution in Tehachapi or inhibited their testimony at the rules violation hearings. Once again, it is appellant’s obligation to produce a record which discloses that an error relied upon has, in fact, occurred. (*People v. Lopez, supra*, 93 Cal.App.2d at p. 668.) Absent such a showing, appellant’s claim of obstruction of justice must be rejected.

In our view, the contentions set forth in appellant’s supplemental opening brief filed July 9, 2002, do not merit reversal.

Our independent review discloses no other reasonably arguable appellate issues. “[A]n arguable issue on appeal consists of two elements. First, the issue must be one which, in counsel’s professional opinion, is meritorious. That is not to say that the contention must necessarily achieve success. Rather, it must have a reasonable potential for success. Second, if successful, the issue must be such that, if resolved favorably to the appellant, the result will either be a reversal or a modification of the judgment.” (*People v. Johnson* (1981) 123 Cal.App.3d 106, 109.)

DISPOSITION

The judgment is affirmed.